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In The

Supreme Court of the United States

October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant is constitutionally entitled to a jury trial when he is tried on several offenses punishable by six months' imprisonment or less, but the aggregate maximum authorized penalty exceeds six months' imprisonment.

2. Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 65 F.3d 252, and appears in the Joint Appendix at J.A. 27. The unpublished opinion of the United States District Court for the Eastern District of New York appears in the Joint Appendix at J.A. 14. No other opinions have been rendered.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2

The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

18 U.S.C. § 1701

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or

conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 3584(a)

If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT OF THE CASE

Petitioner Ray A. Lewis, a mail handler, was charged with obstructing the mail on two dates in June of 1993, in violation of 18 U.S.C. § 1701. Each count of the two-count information carried a maximum sentence of six months' imprisonment, and consecutive sentences were authorized pursuant to 18 U.S.C. § 3584(a). Since the aggregate authorized penalty was 12 months' imprisonment, Mr. Lewis sought a jury trial. A United States Magistrate Judge for the Eastern District of New York denied this

request. J.A. 12.[1] The Magistrate Judge stipulated that she would not "sentence Mr. Lewis to more than six months in prison under any circumstances" and tried the case without a jury. J.A. 12.

The trial evidence showed that on June 3, 1993 (Count 1), and June 4, 1993 (Count 2), Mr. Lewis removed money from letters that he took from the mail stream and then discarded the letters. The Magistrate Judge convicted Mr. Lewis of both counts, and sentenced him to concurrent terms of three years' probation.

Mr. Lewis appealed to the United States District Court for the Eastern District of New York, on the ground that the aggregate 12-month penalty entitled him to a jury trial. The district court affirmed the conviction. In a written opinion, the court relied on the dissenting opinion in *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), to conclude that "a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged." J.A. 18. Having found that the jury trial right did not attach in this case, the district court did not rule on the effect of the sentencing stipulation. J.A. 22.

The United States Court of Appeals for the Second Circuit affirmed. The court recognized that those federal courts to consider the question were unanimous in concluding that the aggregate penalty authorized for a defendant's conduct determined whether he was entitled

[1] Page citations preceded by "J.A." refer to the Joint Appendix.

to a jury trial. 65 F.3d at 254. Nevertheless, the court rejected this reasoning and held that "Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense." 65 F.3d at 255. The court supported this assertion by noting that, under 18 U.S.C. § 3584(a) multiple terms of imprisonment imposed simultaneously are presumptively concurrent. The court viewed this as a legislative directive that "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *Id.*

The court also held that Mr. Lewis was not entitled to a jury trial since "the question of [his] right to a jury trial could have been obviated altogether" had the government chosen to sever the two counts and prosecute them separately. *Id.* Finally, the court noted that the pretrial sentencing stipulation had no effect on the jury trial right. "[S]elf-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial." *Id.* at 256.

SUMMARY OF ARGUMENT

I.

Under this Court's decisions interpreting the Sixth Amendment, the jury trial right turns primarily on an objective measure of the seriousness of the defendant's conduct, as reflected by the maximum sentence authorized by the legislature. If the authorized sentence exceeds six months' imprisonment, the offense is "serious,"

and the jury trial right attaches. *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970) (plurality opinion). However, cases that are "petty" under this objective test are still triable by jury if the proscribed conduct was serious at common law. Applying these rules here, Mr. Lewis was entitled to a jury trial. He was tried on two counts of obstruction of the mails, a serious offense at common law. Each count carried a six-month maximum, and consecutive sentences were authorized.

In multiple offense prosecutions the aggregate authorized penalty determines the jury trial right. The plain language of the jury trial provision of the Sixth Amendment attaches the jury trial right to the entire "prosecution," and not to a particular offense. Thus, when the defendant is tried on several offenses in a single prosecution, criminal seriousness for jury trial purposes should be determined by assessing the total authorized penalty, as opposed to the penalty authorized for just one of the offenses charged. If consecutive sentences are authorized, and they aggregate to more than six months' imprisonment, the jury trial right attaches.

The authorized penalty is the most accurate measure of criminal seriousness for Sixth Amendment purposes because it represents the best measure of society's judgment concerning the impact of the defendant's conduct. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989). This rationale accordingly mandates an aggregation rule. Society suffers a greater harm from someone who has committed two crimes on two occasions than from someone who has committed one crime on one occasion. Thus, when consecutive sentences are authorized, the aggregate

penalty is a better reflection of society's judgment than is the statutory maximum for any single offense charged.

This conclusion is supported by the Court's decision in *Codispoti v. Pennsylvania*, 418 U.S. 506, 516-17 (1974). In that case, the Court held that, in a criminal contempt prosecution, the aggregation of several petty penalties imposed after a single trial rendered the prosecution serious and required a jury trial. Since the core constitutional principles underlying the right to a jury trial are the same in criminal contempt cases and in statutory offense cases, the aggregation rule of *Codispoti* should apply to statutory offense cases as well.

The Second Circuit's contrary conclusion must be rejected. The court incorrectly viewed 18 U.S.C. § 3584(a), the statute authorizing consecutive sentences in this case, as reflecting a congressional determination that multiple petty offenses "prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *United States v. Lewis*, 65 F.3d 252, 255 (2d Cir. 1995). In fact, Congress's express decision to authorize consecutive sentences flatly contradicts this reasoning. The court below also incorrectly reasoned that, because the prosecutor could have eliminated the need for a jury trial by trying the two counts separately, no jury trial was required. That the counts could have been severed is irrelevant to whether the jury trial right attached to a trial in which the counts were joined.

Alternatively, even assuming that the Court rejects an aggregation rule for statutory offense cases, Mr. Lewis was entitled to a jury trial under the traditional common-law test. The conduct for which he was prosecuted was a

felony at common law, and was punishable by death. Accordingly, the charged offenses were serious for jury trial purposes irrespective of the authorized sentence. *District of Columbia v. Colts*, 282 U.S. 63, 71 (1930); *Callan v. Wilson*, 127 U.S. 540, 556 (1888).

II.

Both in common-law England and colonial America the only offenses triable without a jury were those so designated by the legislature. Courts had no power to extinguish the jury trial right once it had been conferred by the legislature. *Schick v. United States*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting). Consistent with this tradition, this Court's jury trial cases have uniformly embraced the position that the determination of criminal seriousness is exclusively the domain of the legislature. *Blanton v. City of North Las Vegas*, 489 U.S. at 541-42. It is for this reason that the sentence actually imposed does not determine the jury trial right. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968). It follows from this that a judge's pretrial sentencing stipulation is likewise incapable of extinguishing the jury trial right. If the judge cannot negate the legislative determination of criminal seriousness after the trial, when fully informed of the facts and circumstances of the case, he or she certainly cannot do so before the trial, when the case has not yet been heard. *See Duncan*, 391 U.S. at 159-60; *Blanton*, 489 U.S. at 544.

ARGUMENT

I. MR. LEWIS WAS ENTITLED TO A JURY TRIAL BECAUSE THE CRIMES WITH WHICH HE WAS CHARGED WERE "SERIOUS" WITHIN THE MEANING OF THIS COURT'S DECISIONS INTERPRETING THE SIXTH AMENDMENT.

Petitioner Ray A. Lewis was tried on two counts of obstructing the mail, each of which carried a possible sentence of six months' imprisonment and a fine. Under 18 U.S.C. § 3584(a), which authorized consecutive sentences in this case, the maximum possible penalty was 12 months' imprisonment. Under these circumstances, he was unconstitutionally denied a jury trial. The plain language of the Constitution's jury trial guarantees and this Court's recent jury trial decisions indicate that the jury trial right is contingent on the aggregate penalty a defendant faces. Since the maximum authorized penalty for Mr. Lewis's criminal conduct exceeded six months' imprisonment, a serious criminal sanction, Mr. Lewis was entitled to a jury trial. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989); *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970) (plurality opinion); *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974). Alternatively, since the common-law crimes closest to Mr. Lewis's conduct were serious felonies, some punishable by death, Mr. Lewis was entitled to a jury trial irrespective of the maximum authorized penalty.

A. The Development of the Petty/Serious Distinction.

Article III, § 2, of the United States Constitution guarantees a jury in the "Trial of all Crimes, except in Cases of Impeachment"; the Sixth Amendment provides for a jury trial in "all criminal prosecutions." Despite the unyielding language of these provisions, this Court has long held that the jury trial guarantee applies only to "serious" prosecutions, and that there is a small category of "petty" cases for which the constitution does not require a trial by jury. *See Callan v. Wilson*, 127 U.S. 540, 557 (1888).

At common law, all criminal cases, without exception, were tried before a jury. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L.R. 917, 923-24 (1926). However, from the sixteenth century on, successive generations of Parliaments enacted laws permitting various types of offenses to be summarily disposed of without a jury, to ease the overcrowding of the courts. *Id.* at 928-33. Although usually petty, the offenses that could be tried summarily were not of any particular class, and indeed in a few rare situations offenses carrying very serious sanctions were exempted from trial by jury. *Id.* For all such offenses, it was the legislature, and not the court, that determined whether an exemption from trial by jury was appropriate. *Id.* at 927.

The American colonists embraced the jury trial right as it had been known at common law. Frankfurter &

Corcoran, *supra*, at 927. In keeping with their common-law antecedents, colonial legal systems prosecuted certain petty offenses summarily, without juries. *Id*. at 938-65 (discussing the relevant statutes of seven of the original colonies). These petty offenses were generally victimless breaches of local standards of morality, such as profanity, drunkenness and breaking the sabbath (*see, e.g., id*. at 944, 950) or other small-scale regulatory offenses (*see, e.g., id*. at 945, 951). *See generally United States v. Barnett*, 376 U.S 681, 749-50 (1964) (Goldberg, J., dissenting). As in England, the jury trial right was extinguishable by the legislature for these categories of offenses, but judges had no power to deny an individual defendant a jury trial in a case where it was authorized. Frankfurter & Corcoran, *supra*, at 965-68.

This Court has long held that the framers intended to incorporate the distinction between petty and serious offenses into the Constitution, and that only serious criminal prosecutions are covered by the Sixth Amendment jury trial guarantee. *Callan v. Wilson*, 127 U.S. at 555. Prior to 1968, when *Duncan v. Louisiana* was decided, the Court looked primarily to the legislative characterization of a particular offense at common law in making this determination.

Callan was the first case in which the Court distinguished between petty and serious offenses for the purposes of the Sixth Amendment jury trial right. In *Callan*, the defendant was convicted of conspiracy at a summary proceeding, and was sentenced to a $25 fine or 30 days in jail. 127 U.S. at 540. The Court acknowledged that there was a class of petty cases that could be constitutionally tried without a jury, but concluded that a conspiracy

prosecution was not one of them because conspiracy was an "infamous crime," and hence indictable by grand jury, at common law. *Id*. at 556. The Court also used a common-law analysis in *District of Columbia v. Colts*, in which the defendant was charged with reckless driving "at a greater rate of speed than twenty-two miles an hour." 282 U.S. 63, 71 (1930) (citation omitted). Without reference to the maximum penalty, the Court found the offense of reckless driving to be serious since it was "an indictable offense at common law." *Id*. at 73.

When this common-law test of seriousness could not easily be applied, or resulted in a determination that the defendant's conduct was petty, the early decisions of this Court also examined the authorized penalty to determine whether a jury trial was required. For example, in *Schick v. United States*, 195 U.S. 65, 67-68 (1904), the Court considered both the moral quality of the charged conduct (since the offense had no common-law equivalent) and the authorized punishment, before finding the offense petty. Similarly, in *District of Columbia v. Clawans*, 300 U.S. 617 (1937), the Court first found the defendant's conduct petty under the common-law test. "Engaging in the business of selling secondhand property without a license was not indictable at common law." *Id*. at 625. The Court went on to consider whether the maximum authorized penalty for the offense – 90 days' imprisonment – was nevertheless "sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded." *Id*. It concluded that it was not. *Id*. at 625-27.

With the increasing complexity of modern criminal codes, the common-law test has become more difficult to apply. *Blanton*, 489 U.S. at 541 n.5. Moreover, in 1968, the

Court held that the Sixth Amendment jury trial right was applicable in state, as well as federal prosecutions, thus making the right available in the widely disparate judicial systems of the several states. *Duncan*, 391 U.S. at 149. Apparently in light of these developments, the *Duncan* Court followed *Clawans* in resorting primarily to "objective criteria," in particular the maximum authorized penalty, to determine whether a given prosecution was serious, and thus subject to the jury trial requirement. 391 U.S. at 161. The Court held that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." *Id.* at 159 (citing *Clawans*); *see also Blanton*, 489 U.S. at 542. The Court did not abandon the common-law test it had previously applied, but made that test subsidiary to the search for an objective measure of the seriousness of the prosecution – the maximum punishment authorized for the offense. 391 U.S. at 159. Subsequently, in *Baldwin v. New York*, 399 U.S. at 72-73, the Court held that under this objective test any offense punishable by more than six months' imprisonment is serious and must receive a jury trial.

This objective test remains faithful to the constitutional underpinnings of the jury trial right because it embodies the bedrock historical principle that the legislature's determination of criminal seriousness is inviolate. However, criminal conduct that is found to be petty under the objective test must still be analyzed under the common-law test. "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise

qualify as petty offenses." *Duncan*, 391 U.S. at 159 (citation omitted). Only conduct found to be petty under both tests can be tried without a jury.

B. Mr. Lewis was Entitled to a Jury Trial Under Both the Objective Test and the Common-Law Test.

The maximum authorized penalty for each count with which Mr. Lewis was charged was six months' imprisonment, a penalty that is presumptively petty. *Blanton*, 489 U.S. at 543. However, since 18 U.S.C. § 3584(a) authorized consecutive sentences, the maximum authorized penalty for Mr. Lewis's criminal conduct was 12 months' imprisonment, a serious criminal sanction. *Blanton*, 489 U.S. at 542; *Baldwin*, 399 U.S. at 72-73; *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974). Moreover, the common-law crimes closest to Mr. Lewis's conduct were serious felonies, some punishable by death. Accordingly, under both the objective test and the common-law test of criminal seriousness, Mr. Lewis was entitled to a jury trial.

1. The Objective Test.

The plain language of the Sixth Amendment, the rationale for the objective test of criminal seriousness itself, and this Court's jury trial decisions all indicate that the total authorized penalty in a multiple-offense prosecution determines whether a jury trial is constitutionally required.

Historically, this Court's decisions in this area have analyzed cases in which the defendant was tried on a single offense. Thus, although the doctrine exempting from jury trials most offenses carrying a maximum penalty of six months or less has come to be known as the "petty offense" exception, that is so only because in each of the Court's prior cases the parameters of the offense and the prosecution were the same. However, when the defendant is charged with several offenses in a single prosecution, the plain language of the Sixth Amendment requires that the aggregate penalty be the basis for determining whether a jury trial is required.

The Sixth Amendment guarantees a jury trial not for a particular "offense," but rather "[i]n all criminal prosecutions." Since this provision attaches the right to the "prosecution," and not the "offense," by its very terms the jury trial right is contingent on the seriousness of the entire prosecution. The facial meaning of the term "prosecution" was no different at the time of the adoption of the Sixth Amendment than it is now. Then, as now, the term was used to refer to the proceeding in which the accused was brought to trial, and was thus a different, and broader, concept than that of the offense with which he was charged. *See* I William Blackstone, *Commentaries* *268 (describing "prosecutions *for* offences") (emphasis added). It is also clear that the framers would have understood the term "prosecution" to include a trial at which misdemeanors were joined. While at common law the joinder of felonies was disfavored, and the judge could require the prosecution to elect only one to proceed

upon, "this practice ha[d] never been extended to misdemeanors." *Pointer v. United States*, 151 U.S. 396, 402 (1894) (citation and internal quotation marks omitted).

Finally, the other rights enumerated in the Sixth Amendment – speedy trial, public trial, confrontation, compulsory process and counsel – attach to the trial itself, not just to a particular offense. Had the framers intended anything different for the jury trial right they would have said so. They clearly knew how to attach a right to certain "offences." In the Fifth Amendment, they limited the right to be tried on an indictment to certain categories of offenses – "capital, or otherwise infamous crime[s]." Similarly, the Double Jeopardy Clause applies not to all successive prosecutions, but only those involving the "same offence." Had the Sixth Amendment likewise been intended to attach to an individual offense it would have so stated. That it does not provides a strong "negative implication" that the framers did not intend the jury trial right to operate in this way. *Cf. Custis v. United States*, 114 S.Ct. 1732, 1736 (1994) (interpreting 18 U.S.C. § 924(e)).

Accordingly, since the nature of the prosecution determines the jury trial right, it is constitutionally irrelevant that none of the individual offenses in a multi-offense prosecution carries an authorized penalty greater than six months' imprisonment. If the aggregate penalty authorized at a single trial exceeds six months, the defendant is subject to a serious criminal sanction and is entitled to a jury trial; if it does not, then the case can be tried by the judge alone.

An aggregation rule is also consistent with the rationale for the objective test, under which society's judgment is deemed to be best reflected by the maximum authorized penalty. *Blanton*, 489 U.S. at 541. In multiple-offense prosecutions, the relevant societal judgment is embodied in statutes such as 18 U.S.C. § 3584(a), which authorize consecutive sentences. This authorization reflects a legislative determination that the offender's total conduct is as serious as the aggregate penalty authorized for all of the offenses charged.

Indeed, this Court has indicated that statutes such as 18 U.S.C. § 3584(a), which affect the total sentence in the case, are relevant to whether the prosecution is serious. In *Blanton*, the Court noted that "any additional statutory penalties" should be considered in determining criminal seriousness. 489 U.S. at 543. Although *Blanton* referred to the additional penalties authorized for a particular single offense, 18 U.S.C. § 3584(a) authorizes a closely related type of additional penalty – a sentence that is the sum of all the maximum sentences for each charged offense in the prosecution. It is thus an "additional statutory penalty" that attaches to the prosecution as a whole, instead of to a particular offense.

Considering § 3584(a) as an "additional statutory penalty" for jury trial purposes is fully consistent with *Duncan*'s emphasis on the importance of society's assessment of the seriousness of the defendant's transgression. Society is affected by, and hence judges, a defendant's conduct as a whole; it does not break it down into

"offenses."[2] Thus, in multiple-offense prosecutions, society's judgment is not accurately reflected in the statutory maximum for any single offense charged; it is best reflected in the statutory provision providing for consecutive sentences.

Treating the total punishment permitted by statute as the relevant measure of societal judgment for jury trial purposes is also consistent with constitutional principles in related areas. In the Double Jeopardy context, for example, the question whether a defendant has been "twice punished" for Double Jeopardy purposes revolves around the total punishment the legislature has authorized for the defendant's conduct; as long as multiple penalties are permitted by statute, even if applied to the very same conduct, the Double Jeopardy Clause has not been violated. *See Ohio v. Johnson*, 467 U.S. 493, 499 & n.8 (1984); *Whalen v. United States*, 445 U.S. 684, 688-89 (1980); *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Implicit in this doctrine is an understanding that the legislative authorization for "double punishment" is an appropriate reflection of society's norms. Similarly, since the jury trial right turns on society's judgment of all of the defendant's conduct, in a multiple petty offense prosecution, that

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[2] Indeed, the particular offense or offenses with which a defendant is charged is an artificial decision made by a local prosecuting agency. Often this decision takes into consideration a variety of administrative factors, such as court crowding and staffing concerns, that are extraneous to society's judgment of the underlying criminal conduct. *See United States v. Goodwin*, 457 U.S. 368, 382 n.14 (1982) (discussing practical restraints on prosecutors).

judgment is best reflected by the aggregate penalty authorized by the legislature.

In fact, in only a slightly different context, this Court already has adopted an aggregation rule. In *Codispoti v. Pennsylvania*, 418 U.S. at 506, the defendant was convicted at a single non-jury trial of several petty criminal contempts. He received consecutive petty sentences of six months' imprisonment or less on each contempt, for a total of 39 months' imprisonment. *Id.* at 509. This Court reversed on the ground that, in light of the aggregate penalty, the defendant "was tried for what was equivalent to a serious offense and was entitled to a jury trial." *Id.* at 516-17. Under *Codispoti*, the aggregation of multiple petty offenses renders a prosecution serious for jury trial purposes.

Nor is the *Codispoti* rule limited to criminal contempt cases.[3] Although aspects of the jury trial right in contempt cases differ from those in statutory offense cases, the root constitutional principle – serious prosecutions must be tried by a jury – and the six-month cut off point are the same. "[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." *Codispoti*, 418 U.S. at

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[3] In fact, the aggregation principle endorsed by *Codispoti* explicitly derives from *Baldwin*. *See Codispoti*, 418 U.S. at 512 & n.4. Moreover, in *Blanton*, both *Baldwin* and *Codispoti* are cited in support of the general principle that "a potential sentence in excess of six months' imprisonment is sufficiently severe to take the offense out of the category of 'petty.' " *Blanton*, 489 U.S. at 543 n.7 (citation omitted).

516 (citations and internal quotation marks omitted).[4] Thus, just as the aggregate penalty turned a multiple petty offense prosecution into a serious one for jury trial purposes in *Codispoti*, so should it in multiple statutory offense prosecutions, such as that faced by Mr. Lewis.

There are two other decisions of this Court that support the view that the jury trial right is determined by the aggregate penalty exposure resulting from the entire prosecution. *Baldwin v. New York* voided a statute eliminating jury trials in all cases brought in the New York City Criminal Court, noting that this statute was unique in the country in "den[ying] an accused the right to interpose between himself and a *possible prison term of over six months*, the commonsense judgment of a jury of his peers." 399 U.S. at 72 (emphasis added) (footnote

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[4] Because criminal contempt traditionally does not carry a statutory maximum set by the legislature, this Court has identified the penalty actually imposed as the most relevant measure of society's judgment of a contemnor's conduct for jury trial purposes. *Bloom v. Illinois*, 391 U.S. 194, 211 (1968). That this Court equates the penalty actually imposed in contempt cases with the authorized maximum in statutory offense cases only bolsters the conclusion that the aggregation rule of *Codispoti* should apply in statutory offense cases. When the judge determines the sentence in a contempt case, he or she is doing nothing more than determining the seriousness of conduct affecting the judicial function. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787, 795-96 (1987). This is the same judgment that legislatures exercise in authorizing penalties for statutory offenses. Thus, if the "legislative" judgment of the judge in a contempt case that consecutive sentences are warranted triggers a jury trial for offenses that would otherwise be petty, so should the identical judgment of the legislature in statutory offense cases.

omitted). *Baldwin* held that a defendant is entitled to a jury trial whenever "what is at stake is the deprivation of individual liberty for a period exceeding six months," regardless of the nature of the individual charges that make up the prosecution. *Id.* Thus, under *Baldwin*, a jury trial can constitutionally be dispensed with only where "the accused *cannot possibly* face more than six months' imprisonment." *Id.* at 73 (emphasis added); *see also Codispoti*, 418 U.S. at 512 n.4 (noting that jury trial required when "term of imprisonment authorized" exceeds six months).

That an aggregation rule is constitutionally required is also suggested by *United States v. Goodwin*, 457 U.S. at 368. There, the defendant was charged with several offenses arising out of a single course of conduct. No single offense carried a penalty in excess of six months' incarceration, but the aggregate authorized penalty was 28 months in prison. 457 U.S. at 387 & n.1 (Brennan, J., dissenting). In analyzing the defendant's due process argument that he was penalized for insisting on a jury trial, this Court assumed that he was constitutionally entitled to a jury trial. *Id.* at 382-83. Indeed, the dissenting opinion specifically noted that the defendant had invoked his "statutory *and constitutional* right to a trial *by jury*." *Id.* at 387 (Brennan, J., dissenting) (emphasis in original).

Consistent with this Court's broad conception of the jury trial right, the overwhelming majority of the lower federal courts to consider the question have concluded that the Constitution requires a jury trial in any multiple-offense trial at which the defendant's aggregate authorized penalty exceeds six months' imprisonment. Three courts of appeal have so held. *United States v. Coppins*, 953

F.2d 86 (4th Cir. 1991); *United States v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991); *Rife v. Godbehere*, 814 F.2d 563 (9th Cir.), *amended by*, 825 F.2d 185 (9th Cir. 1987).[5] Furthermore, four district courts have reached the same conclusion. *United States v. Musgrave*, 695 F.Supp. 231 (W.D. Va. 1988); *United States v. O'Connor*, 660 F.Supp. 955 (N.D. Ga. 1987) (exercising appellate jurisdiction from a decision of a United States Magistrate Judge, pursuant to 18 U.S.C. § 3402); *United States v. Coleman*, 664 F.Supp. 548 (D.D.C. 1985); *United States v. FMC Corp.*, 428 F.Supp. 615 (W.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d 902 (2d Cir. 1978). Only the lower courts in the instant case and a recent decision of the Eleventh Circuit, *United States v. Brown*, 71 F.3d 845 (11th Cir.), *petition for cert. filed*, (U.S. January 16, 1996) (No. 95-7422) (relying on *Lewis*), have held otherwise.

The reasons advanced by the Second Circuit for rejecting an aggregation rule do not withstand constitutional scrutiny. The court's primary justification was its misreading of 18 U.S.C. § 3584(a). This section states that "[m]ultiple terms of imprisonment imposed at the same time" are presumptively concurrent unless the sentencing judge specifies otherwise. From this, the court of appeals inferred a congressional judgment that "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." 65 F.3d at 255.

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[5] In fact, the Fourth Circuit first so held over 70 years ago. *Coates v. United States*, 290 F. 134 (4th Cir. 1923).

The text of § 3584(a) itself proves the court of appeals wrong. The statute unambiguously authorizes consecutive sentences in multiple-offense prosecutions, a clear manifestation of Congress's judgment that someone who commits two or more crimes is a worse miscreant than someone who commits only one. For jury trial purposes, it is irrelevant that under this section the sentencing court must explicitly order the sentences to run consecutively in a multiple-offense case, just as it is irrelevant that the court must explicitly announce the imposition of a particular sentence in rendering its judgment in a single-offense case. In determining whether a defendant is entitled to a jury trial, the reviewing court must "assume[] that a defendant . . . would receive the *maximum* authorized prison sentence," regardless of what the sentencing court actually says or does. *Blanton*, 489 U.S. at 544 (emphasis in original). Only this method of analysis provides the appropriate measure of the legislature's judgment as to the seriousness of the defendant's conduct.

The Second Circuit also rationalized the denial of a jury trial in this case by observing that the "question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations" and tried them separately. 65 F.3d at 255. But that the two counts *could have been* severed has no bearing on the constitutional requirements of a trial at which they were *not* severed. *Cf. Codispoti*, 418 U.S. at 517.[6] That the

[6] Under the court of appeals's reasoning, if taken to its logical extreme, a jury trial could be denied in almost any prosecution, even for a serious felony, as long as the prosecution

government is capable of prosecuting a case as a petty offense does not affect the constitutional analysis of a prosecution that is itself serious. This Court does not make constitutional rules on the assumption that the government will extend itself wherever possible to circumvent the Bill of Rights. Indeed, in *Singer v. United States*, 380 U.S. 24 (1965), this Court declined to hold that the fact that Fed. R. Crim. P. 23(a) would allow the government to withhold its consent to a defendant's waiver of a jury trial for an "ignoble purpose" rendered the rule unconstitutional. *Id.* at 37.

Moreover, contrary to the Second Circuit's expectations, it is unlikely that prosecutors will choose to prosecute otherwise joinable misdemeanors serially. Even assuming that the manipulation of multiple counts solely to avoid a jury trial is not a due process violation (*but see Goodwin*, 457 U.S. at 380 n.11), there is little reason to assume that the government will do so. As the court below pointed out, conducting successive bench trials is "contrary to judicial economy." 65 F.3d at 255. Moreover, by severing joinable counts, the government forfeits the distinct tactical advantage of having the finder of fact hear evidence that the defendant has committed two or more crimes, not just one. In fact, putting aside any tactical considerations, both sides benefit from, and should prefer, a jury trial. *Goodwin*, 457 U.S. at 383 n.18.[7]

represented that it "could have" reduced the charge to a petty offense for which no jury trial would be required, but elected not to do so.

[7] The aggregation question frequently arises in cases in which the multiple charges have arisen from a single

The objective test of criminal seriousness articulated by *Duncan*, *Baldwin*, and *Blanton* looks to the maximum authorized penalty as a reflection of society's judgment concerning the seriousness of a defendant's criminal conduct. In multiple-offense prosecutions for which consecutive sentences are authorized, that judgment is best measured by the aggregate penalty to which the defendant is exposed. Since Mr. Lewis faced an aggregate sentence of 12 months' imprisonment, a serious criminal sanction, he was entitled to a jury trial.

2. The Common-Law Test.

Even if this Court concludes that the Sixth Amendment does not require aggregating the potential penalties at a multiple-offense trial, Mr. Lewis was nevertheless entitled to a jury trial, since the crimes with which he was charged were serious at common law. Although this Court has not applied the common-law test in its recent decisions, that test has never been repudiated.[8] In fact, *Duncan*, the progenitor of the modern objective test,

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transaction. In such cases, it is even less likely that successive prosecutions would be possible. Justice Department policy requires that all charges arising from a single transaction be "alleged and tried together and should not be made the basis of multiple prosecutions." *Petite v. United States*, 361 U.S. 529, 530 (1960) (per curiam) (citation omitted). Moreover, double jeopardy considerations will preclude certain successive prosecutions irrespective of the *Petite* policy. *See Ashe v. Swenson*, 397 U.S. 436 (1970).

[8] *Blanton* describes the Court's cases as "mov[ing] away" from the common-law test of criminal seriousness, but does not reject it. 489 U.S. at 541 n.5.

explicitly incorporates the common-law test as an alternative basis for finding criminal seriousness when the authorized penalty for an offense is six months or less. 391 U.S. at 159. More recently, the Advisory Committee that drafted the 1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates noted the continuing viability of the Common-Law Test.

> [T]he definition of a 'petty offense' in 18 U.S.C. § 1(3), 'any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both,' will usually but not inevitably apply here. The Supreme Court has recognized the historical difference in treatment accorded petty offenses and has excluded them from the requirement that the trial of 'crimes' be by jury. . . . *Nevertheless, certain offenses have traditionally been considered 'crimes' at common law, and are still such even though the maximum penalty currently prescribed by law is not more than six months imprisonment or a fine of $500.* That is, the penalty prescribed is of major relevance in determining whether an offense is petty in the constitutional sense, but is not the sole criterion; the historical antecedents of the offense and the ethical condemnation with which the community views the offense are also important.

1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates (Advisory Committee's Note) (citations omitted) (emphasis added).

Theft from the mails is one of those modern offenses that was clearly serious at common law; such conduct must thus be tried by a jury irrespective of the authorized penalty. *Duncan*, 391 U.S. at 159. On two occasions in June

of 1993, Mr. Lewis allegedly stole money from mail that he handled in the course of his employment as a postal worker. Although he was charged with misdemeanors, at common law the identical conduct was extremely serious. Under a 1766 English statute, a person who stole from the mails was "deemed guilty of felony." 7 Geo.3, ch. 50, § II (Eng.) (repealed 1888). The penalty was "death as a felon, without benefit of clergy." *Id*. A postal employee who destroyed mail, or who failed to turn over monies received as payment for postage, was likewise "deemed guilty of felony," although this particular offense was not a capital crime. *Id*. at § IV.

The colonists took a similarly hostile view of theft from the mails. In 1792, the Second Congress enacted legislation that established a federal post office and post roads. Under this statute, the theft of money or monetary instruments from the mail was also punishable by death. Act of February 20, 1792, ch. 7, § 16, 1 Stat. 232, 236 (expired 1799).

As these statutes demonstrate, at common law, theft from the mails was "an offence of a grave character." *Callan*, 127 U.S. at 556. The mere designation of the conduct as a "felony" rendered it indictable. Under this Court's precedents, therefore, theft from the mails is not a petty offense. *Id*.; *Colts*, 282 U.S. at 73. Accordingly, under the common-law test, Mr. Lewis was charged with serious offenses and was entitled to a jury trial irrespective of the maximum authorized penalty. *Duncan*, 391 U.S. at 159.

* * *

For the foregoing reasons, under both the objective test and the common-law test, Mr. Lewis was entitled to a jury trial.

II. UNDER THE SIXTH AMENDMENT, THE TRIAL JUDGE'S PRETRIAL DECISION NOT TO IMPOSE A SENTENCE IN EXCESS OF SIX MONTHS COULD NOT DEPRIVE MR. LEWIS OF A JURY TRIAL.

The historical and political origins of the jury trial right demonstrate that there is no constitutional basis for allowing the judge to extinguish the right to a jury trial by promising to impose a particular sentence. The right to a jury trial has always been determined by legislative enactment, and not by the ruling of an individual judge. This Court's cases have uniformly respected this rule, and have consistently relied on legislative classifications in determining whether the jury trial right attaches. Thus, since the legislative classification of criminal seriousness cannot be modified by the trial judge (*Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989)), the Magistrate Judge's promise not to sentence Mr. Lewis to more than six months in prison did not extinguish his right to a jury trial.

At common law, the offenses that could be tried summarily usually, but not always, carried petty penalties; in a few rare situations, crimes carrying very serious sanctions were exempted from trial by jury. Frankfurter & Corcoran, *supra*, 928-33. The one thing all such offenses had in common, however, was that the authority to try

them without a jury was expressly provided by the legislature. At common law, only a legislative act could extinguish the jury trial right. *Id.* at 927. The judge presiding over a particular case had no independent power to do so. *See Schick v. United States*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting):

> I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta* and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament.*

Id. (emphasis in original).

Colonial legal systems also prosecuted petty offenses summarily, without juries. *See* Frankfurter & Corcoran, *supra*, at 938-65 (collecting the relevant statutes of seven of the original colonies). As in England, the right was extinguishable by the legislature for these categories of offenses, but judges had no power to deny an individual defendant a jury trial in a case where it was authorized. *Id.* at 965-68. Indeed, so ingrained was this principle that Justice Harlan's dissent in *Schick* went so far as to assert that no court, not even this Court, could deem an offense triable without a jury absent an explicit congressional designation that a jury trial was not required. 195 U.S. at 98-99.

To the framers of the Constitution, the right to trial by jury was more than a procedural right intended to benefit a particular defendant; it was one of the most

cherished structural components of government itself. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.R. 867, 870-72 (1994). As the Court noted in *Duncan*,

> [t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

391 U.S. at 156 (footnotes omitted). The framers viewed the jury trial right as a means of ensuring that the power to deprive a citizen of liberty was not concentrated in the hands of the government. Thus, it would have been inconceivable to them that, in those prosecutions to which it attached, the jury trial right could be unilaterally extinguished by the judge.[9]

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[9] Of course, the jury trial right in serious cases, like the right to counsel in felony cases, can be waived. *See Patton v. United States*, 281 U.S. 276 (1930); *Faretta v. California*, 422 U.S. 806 (1975).

This Court's jury trial cases have consistently embraced the view that the determination of criminal seriousness is one that is indelibly fixed by the legislature. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " *Blanton*, 489 U.S. at 541-42 (citation omitted). Thus, if a particular case is serious, it must be tried by a jury regardless of the trial judge's assessment. A pretrial sentencing stipulation cannot negate the legislative classification of criminal seriousness in the jury trial context any more than it can negate the analogous classification – designation as a felony – when it comes to the right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).[10]

To hold otherwise would be to eviscerate the objective test for criminal seriousness as established by *Duncan* and its progeny. Under that test, the Court always assumes that the defendant will be subject to the maximum sentence authorized by the legislature, regardless of what the trial court actually does (*Blanton*, 489 U.S. at

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[10] While *Scott v. Illinois*, 440 U.S. 367 (1979), permits a pretrial stipulation to extinguish the right to counsel in state court misdemeanor cases, *Gideon* requires counsel in all felony cases. The trial court cannot "convert" a felony into a misdemeanor with a sentencing promise, then deny the defendant an attorney. Similarly, the court cannot "convert" a serious prosecution into a petty one so as to deny the defendant a jury trial.

544), and the actual sentencing consequences to the particular defendant are irrelevant. *Duncan*, 391 U.S at 159-60. A pretrial stipulation, like the actual sentence imposed, does not change the statutory maximum.

Indeed, only one federal court has ever held to the contrary, and its reasoning is seriously flawed. In *United States v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991), the defendant was tried on four offenses, each of which carried a maximum penalty of six months' imprisonment or less; the maximum authorized sentence was more than 18 months' imprisonment. *Id.* at 1514. The trial court refused to grant the defendant a jury trial, but stipulated that should he be convicted the court would not impose a sentence in excess of six months. *Id.* at 1513. On appeal, the Tenth Circuit acknowledged that the defendant was constitutionally entitled to a jury trial in this situation, but held that the pretrial stipulation had extinguished that right. *Id.* at 1520.

The Second Circuit addressed this question below, but reached a different result. In *dicta*, the court refused to follow *Bencheck*; it noted that the government's claim that the pretrial stipulation had effectively extinguished Mr. Lewis's right to a jury trial was "unavailing":

> The measure for constitutionally required jury trials is the 'seriousness' of any given offense or offenses, which is, in turn, measured principally by the maximum punishment authorized by Congress; therefore, self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial.

Lewis, 65 F.3d at 255-56. This Court should likewise reject the reasoning of *Bencheck*.

Bencheck's primary flaw is that it incorrectly assumes that the sentence that the defendant is likely to receive is an adequate reflection of the societal judgment upon which the jury trial right turns. This Court's decisions unambiguously hold that the jury trial right depends on society's judgment of the defendant's conduct, not the trial court's. That is why the sentence actually imposed is irrelevant to the issue. *Duncan*, 391 U.S. at 159-60; *Blanton*, 489 U.S. at 541. If the sentencing court's informed judgment of criminal seriousness, as reflected in the sentence actually imposed, is not an adequate substitute for the societal judgment embodied in the maximum authorized penalty, then clearly the court's uninformed pretrial prediction of criminal seriousness cannot be either.[11]

The aberrational methodology permitted by *Bencheck* thus defies *Duncan* irrespective of the Tenth Circuit's claim that its approach was "objective." 926 F.2d at 1518. While it is true that the jury trial right turns on an examination of objective indicia of criminal seriousness, it is not true that the identification of any objective factor at all will suffice. The Tenth Circuit held that because the

[11] The stipulation in Mr. Lewis's case cannot be seen as a judgment as to criminal seriousness at all. The record indicates the stipulation did not arise out of the Magistrate Judge's reasoned judgment of the circumstances of the case, about which she could have had little foreknowledge, but rather solely out of her belief, however erroneous, that such a promise would render a bench trial constitutional. J.A. 12.

pretrial sentencing stipulation set forth an objective measure of the consequences of the prosecution for that particular defendant, *Duncan* and *Blanton* were satisfied. 926 F.2d at 1518. However "objective" in this context does not simply mean "concrete" – it means "categorical." Any prosecution that meets the definition of "serious" must be tried by a jury (*Blanton*, 489 U.S. at 541), and the right is in no way contingent on the facts of the individual case. Thus the trial court's assessment of the case, even if objectively expressed in a pretrial sentencing stipulation, is irrelevant. The only constitutionally permissible inquiry is whether the case falls within the category of prosecutions designated by the legislature as capable of being tried without a jury.

Bencheck's second fallacy is its reliance on the use of pretrial stipulations to determine the jury trial right in criminal contempt cases. 926 F.2d at 1518-19. In such cases, where there is no statutory maximum fixed by the legislature, the judge's assessment of the contemnor's conduct is the most relevant measure of seriousness for jury trial purposes. *Blanton*, 489 U.S. at 542 n.6; *Bloom v. Illinois*, 391 U.S. 194, 211 (1968). However, this rule operates only in the criminal contempt context and has never been applied to the determination of the constitutional right to a jury trial in statutory offense cases. *Blanton*, 489 U.S. at 542. Other than in the unique situation where the offense is against the court itself and the court alone sets the punishment without any legislative input, the legislature's judgment of criminal seriousness is more accurate than the trial court's. *Duncan*, 391 U.S. at 159. Thus, where the legislature has spoken, its judgment alone determines the jury trial right.

Finally, *Bencheck* erroneously relies on the language of Fed. R. Crim. P. 58(a)(3), which allows for relaxed procedural safeguards in petty offense cases "as to which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed." Rule 58(a)(3) has no applicability here. First, the stipulation in *Bencheck*, as in Mr. Lewis's case, was not that "no" imprisonment would be imposed; it was that no more than six months' imprisonment would be imposed. 926 F.2d at 1513; J.A.12. Moreover, it is clear that the jury trial right is not among those extinguishable by a pretrial stipulation under Rule 58(a)(3). On its face, that provision applies only to the right to counsel (Rule 58(b)(2)(C))[12]

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[12] That Rule 58 does not permit a stipulation to do away with the jury trial right is confirmed by its antecedents. The 1970 Rules for the Trial of Minor Offenses before United States Magistrates made no procedural allowances of any kind for pretrial sentencing stipulations. The superseding 1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates authorized such stipulations, but exempted the jury trial right from those extinguishable by stipulation. Moreover, as the Advisory Committee Notes to the 1980 Rules make clear, those rules were based on the untested assumption that *Scott v. Illinois*, 440 U.S. 367 (1979), under which a pretrial stipulation can extinguish the right to counsel in state court misdemeanor prosecutions, applied in federal court. But this Court has never held that *Scott* applies in federal court, and there is considerable doubt that it does. *Scott* itself indicates that its rule is a concession to the "difficulties" of "incorporation" (440 U.S. at 372) and describes its own holding as relating to the "constitutional right to appointed counsel in state criminal proceedings." *Id.* at 373 (footnote omitted). The lower federal courts are split on the applicability of *Scott* to federal prosecutions. *See, e.g., United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991) (*Scott* applies in federal court); *United States v. Doe*, 743 F.2d 1033 (4th Cir. 1984) (assuming, without analysis, that *Scott* applies in federal court); *United States v. Jackson*, 605 F.2d 1319 (4th Cir. 1979) (same); *United States v. Downin*, 884 F.Supp. 1474 (E.D. Cal. 1995) (*Scott* does not apply in federal court); *United States v. Nash*, 703 F.Supp. 507 (W.D. La.), *aff'd on other grounds*, 886 F.2d 1312 (5th Cir. 1989) (assuming, without analysis, that *Scott* applies in federal court); *United States v. Ramirez*, 555 F.Supp. 736 (E.D. Cal. 1983) (*Scott* does not apply in federal court).

and to the procedures enumerated in Rule 58(c) relating to guilty pleas, waivers of venue, sentencing, and notification of the right to appeal. *See* Rule 58(c)(1)-(4).

In sum, the constitutional history of the jury trial guarantee, this Court's jury trial precedents, and the relevant rules of criminal procedure unanimously point toward a single conclusion: A pretrial sentencing stipulation, while capable of extinguishing certain procedural rights, cannot supersede the legislative determination of criminal seriousness. Accordingly, such a stipulation cannot extinguish the jury trial right.

CONCLUSION

For the foregoing reasons, petitioner prays that the judgment below be reversed.

Respectfully submitted,

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